15-46

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 250.

E. A. HITCHCOCK, PLAINTIFF IN ERROR,

vs.

WILLIAM C. BUCHANAN AND JAMES C. WAUGH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 19, 1879.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said court before you, between E. A. Hitchcock, and William C. Buchanan and James C. Waugh, a manifest error hath happened, to the great damage of the said E. A. Hitchcock, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

b Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 12th day of February, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and third year.

[SEAL.] J. A. JONES,
Clerk of the Circuit Court for the Southern District Ills.

(Indorsed:) Supreme Court United States. E. A. Hitchcock vs. William C. Buchanan et al. Writ of error. Filed February 12, 1879. J. A. Jones, cl'k.

c UNITED STATES OF AMERICA, *ss:*

To William C. Buchanan and James C. Waugh, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein E. A. Hitchcock is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, judge of the district court of the United States for said southern district of Illinois and one of the judges of said circuit court, this 20th day of February, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and third year.

S. H. TREAT.

Service of this citation is hereby accepted February 20, 1879.
WM. C. KUEFFNER AND
CHARLES W. THOMAS,
Att'ys for Def'ts.

(Indorsed:) Supreme Court United States. E. A. Hitchcock vs. William C. Buchanan et al. Citation.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, judge of the district court of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit protempore, sole judge of said circuit court, on Wednesday, the 23rd day of January, at the January term of said court, in the year of our Lord eighteen hundred and seventy-ninth, and of our Independence the one hundred and third year.

J. A. JONES, *Clerk.*

E. A. HITCHCOCK
vs.
WILLIAM C. BUCHANAN AND JAMES C. WAUGH. } In assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

E. A. Hitchcock, who is a citizen of the State of Missouri, puts in his place Thomas G. Allen, esq., his attorney, against William C. Buchanan and James C. Waugh, who are citizens of the State of Illinois, and residents of the southern district thereof, defendants, who put in their place Chas. W. Thomas, esq., and Messrs. Kueffner & Dill, their attorneys, in a plea of assumpsit.

2 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 14th day of May, the year of our Lord eighteen hundred and seventy-eight, came said plaintiff, by his said attorney, and filed in the office of the clerk of said court his præcipe for summons, bond for costs, declaration and copy of instrument sued on in said cause which said bond for costs, declaration, and copy of instrument sued on are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States to the June term, 1878.

E. A. HITCHCOCK
vs.
WILLIAM C. BUCHANAN AND JAMES C. WAUGH. } Assumpsit. Damages, $8,000.

I, Thomas M. Williamson, a citizen of Illinois, residing in Jackson County, in said State, do enter myself security for all costs which may accrue in the above cause.

THOS. M. WILLIAMSON.

Dated this 13th day of May, A. D. 1878.

(Endorsed:) Filed May 14, A. D. 1878. J. A. Jones, clerk.

3 *Declaration.*

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States, June term, A. D. 1878.

E. A. HITCHCOCK
vs.
WILLIAM C. BUCHANAN AND JAMES C. WAUGH. } Assumpsit.

E. A. Hitchcock, a citizen of the State of Missouri and resident

thereof, plaintiff, by his attorney, complains of William C. Buchanan and James C. Waugh, citizens of the State of Illinois and residents thereof, defendants, of a plea of trespass on the case on promises:

For that whereas the said defendants heretofore, to wit, on the 15th day of December, A. D. 1875, at the office of Belleville Nail Mill Co., Belleville, Ills., to wit, at the district aforesaid, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there addressed the said bill of exchange to one F. H. Pieper, treas., Belleville, Illinois, by which said bill of exchange they, the said defendants, then and there ordered and requested the said F. H. Pieper, four months after the date thereof, to pay to the order of John Stevens, jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.; and the said F. H. Pieper then and there accepted said bill of exchange by writing on the face thereof the words "accepted, payable at
4 the Continental Bank of St. Louis, F. H. Pieper, treasurer," by which said written acceptance the said bill of exchange was then and there made payable at the Continental Bank of St. Louis, and said bill of exchange so made and accepted, payable as aforesaid, was afterwards then and there, to wit, on the day and year aforesaid, at the district aforesaid, delivered by said defendants to the said John Stevens, jr., cashier, and the said John Stevens, jr., afterwards, to wit, on the day and year aforesaid, indorsed and delivered said bill of exchange to said plaintiff, by which said indorsement and delivery thereof the said bill of exchange was made payable as aforesaid to the order of said plaintiff. And said plaintiff avers that afterwards at the time when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the 18th day of April, A. D. 1876, he indorsed the same, by which indorsement the said sum of money in the said bill of exchange specified was at that time ordered to be paid and became payable to said plaintiff, and, being so made, accepted, and indorsed as aforesaid, said bill of exchange was then presented to and shown at the Continental Bank of St. Louis, and request and demand was then and there made for the payment of the said sum of money specified in said bill of exchange according to the tenor and effect thereof; but the said Continental Bank of St. Louis did
5 not nor would, neither did the said F. H. Pieper, or any other person then and there, or at any time since or elsewhere, pay the said sum of money specified in said bill of exchange, or any part thereof; and the said Continental Bank of St. Louis then and there at the time when said bill of exchange became due and payable and was presented for payment as aforesaid wholly refused, and the said F. H. Pieper then and there wholly neglected so to do; and afterwards, to wit, on the day and year aforesaid, the said bill of exchange was then and there protested because of the non-payment thereof. And said plaintiff further avers that neither at the time of the making of said bill of exchange or from thence to and at the time when the same became due and payable, and was presented and shown for payment as aforesaid, had the said F. H. Pieper received into his hands any effects of the said defendants as a consideration for his aforesaid acceptance of said bill of exchange; neither had said defendants or either of them at the time last mentioned, or at any other time, provided funds or made provision for the payment of said bill of exchange; and said defendants well knew and had notice before and at the time said bill of exchange became due and payable that it would not be paid at the Continental Bank of St. Louis
6 or elsewhere by the said F. H. Pieper; by means whereof they,

the said defendants, became liable, and in consideration thereof afterwards, to wit, on the day and year aforesaid, promised the said plaintiff to pay him the said sum of money in said bill of exchange specified, when they should be thereunto afterwards requested. And yet the said defendants have not paid said sum of money or any part thereof to said plaintiff, although often requested so to do, but to pay the same or any part thereof said defendants have hitherto refused, and still do refuse, to the damage of the said plaintiff eight thousand dollars, and therefore he brings suit, &c.

THOMAS G. ALLEN,
Plaintiff's Attorney.

The following is a copy of the instrument on which the plaintiff's suit is brought:

$5,477.13.] "OFFICE OF BELLEVILLE NAIL MILL CO.,
"*Belleville, Ills., Dec. 15th*, 1875.

"Four months after date, pay to the order of John Stevens, jr., cashier, fifty-four hundred & seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.

"F. H. PIEPER, *Treasurer.*"
"WM. C. BUCHANAN, *Pres't.*
"JAMES C. WAUGH, *Sec'y.*

"To F. H. PIEPER, *Treas., Belleville, Illinois.*"

(Indorsed:) "Pay to the order of E. A. Hitchcock, esq.
"JOHN STEVENS, JR., *Cash.*

"E. A. HITCHCOCK."

(Written across the face:)
Accepted. Payable at the Continental Bank of St. Louis.
(Endorsed:) Filed May 14, A. D. 1878. J. A. Jones, clerk.

7 And afterwards, to wit, on said 14th day of May, in the year last aforesaid, there was issued out of said clerk's office a summons in said cause directed to the marshal of said district to execute; which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss.

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon William C. Buchanan and James C. Waugh, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto E. A. Hitchcock of a plea of trespass on the case upon promises to his damage as he alleges of eight thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, afore-
8 said, this fourteenth day of May, in the year of our Lord one

thousand eight hundred and seventy-eight, and of our Independence the one hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

I hereby appoint John H. Siefert my special deputy to execute this writ. May 20, 1878.

E. R. ROE, *U. S. Mar.*

Executed the within by reading the same to William C. Buchanan and James C. Waugh this 21st day of May, 1878.

E. R. ROE, *U. S. Mar.*,
By JOHN H. SIEFERT,
Special Deputy U. S. Marshal.

(Endorsed:) Filed June 1, A. D. 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 29th day of May, in the year aforesaid, came said defendant Buchanan, by his attorney, and filed in said clerk's office his demurrer in said cause; which said demurrer is in the words and figures following, to wit:

Demurrer of Buchanan.

UNITED STATES OF AMERICA,
Southern District of Illinois:

9 In the circuit court of the United States, June term, A. D. 1878.

WILLIAM C. BUCHANAN AND JAMES C. WAUGH *ats.* E. A. HITCHCOCK. } Assumpsit.

And the said defendant William C. Buchanan, by Charles W. Thomas, his attorney, comes and craves oyer of the supposed bill of exchange in the plaintiff's declaration mentioned, and it is read to him in these words:

$5,477.13.] "OFFICE BELLEVILLE NAIL MILL CO.,
"*Belleville, Ills., Dec.* 15, 1875.

"Four months after date, pay to the order of John Stevens, jr., cashier, fifty-four hundred & seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.

"WM. C. BUCHANAN, *Pres't.*
"JAMES C. WAUGH, *Sec'y.*

"To F. H. PIEPER, *Treas., Belleville, Illinois.*"
(Written across the face in red ink:)
"Accepted. Payable at the Continental Bank of St. Louis.
"F. H. PIEPER, *Treasurer.*"

which being read and heard, the defendant Buchanan says that the said declaration and the matters therein contained in manner and form as the same is above pleaded and set forth are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he, the said defendant Buchanan, is not bound by law to answer the same. Where-

security to be approved by the court, within sixty days from the 23rd day of January, 1879.

And afterwards, to wit, on the 12th day February, in the last aforesaid, came said plaintiff, by his attorney, and filed in said
14 clerk's office his bond on writ of error in said cause which said bond is in the words and figures following, to wit:

Bond on writ of error.

Know all men by these presents that we, E. A. Hitchcock, as principal, and Thos. M. Williamson and W. W. Harris, as sureties, are held and firmly bound unto William C. Buchanan and James C. Waugh in the sum of five hundred dollars, to be paid to the said William C. Buchanan and James C. Waugh, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this third day of February, A. D. 1879.

Whereas the above-named E. A. Hitchcock hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named E. A. Hitchcock shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. A. HITCHCOCK. [SEAL.]
THOS. M. WILLIAMSON. [SEAL.]
W. W. HARRIS. [SEAL.]

Signed in presence of—
THOS. G. ALLEN.

15 Approved.

S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed February 12, 1879. J. A. Jones, clerk.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause wherein E. A. Hitchcock is plaintiff and William C. Buchanan and James C. Waugh are defendants, as fully and completely as the same appear of file and of record in my said office.

Witness my hand and the seal of said court, at Springfield, in said district, this twenty-first day of February, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and third year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 250. E. A. Hitchcock, plaintiff in error, vs. William C. Buchanan & James C. Waugh. S. Illinois C. C., U. S. Filed 19th September, 1879.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 250.

E. A. HITCHCOCK, *Plaintiff in Error.*

vs.

WILLIAM C. BUCHANAN AND JAMES C. WAUGH, *Defendants in Error.*

In Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE.

BRIEF AND ARGUMENT

SUBMITTED BY,

THOMAS G. ALLEN,
Attorney and Counsel for
Plaintiff in Error.

S. F. Brearley & Co., Prs. St. Louis.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 250.

E. A. HITCHCOCK, *Plaintiff in Error.*

vs.

WILLIAM C. BUCHANAN AND JAMES C. WAUGH, *Defendants in Error.*

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ABSTRACT AND STATEMENT OF THE CASE.

This was an action of assumpsit, June term, 1878, in the Circuit Court of the United States for the Southern District of Illinois, instituted by plaintiff in error, against the defendants in error, upon an instrument of which the following is a copy:

"$5,477.13. OFFICE OF BELLEVILLE NAIL MILL CO.,
"BELLEVILLE, ILLS., Dec. 15th, 1875.

"Four months after date, pay to the order of John Ste-
"vens, Jr., cashier, fifty-four hundred and seventy-seven
"$\frac{13}{100}$ dollars, value received, and charge same to account
"of Belleville Nail Mill Co.

"WM. C. BUCHANAN, Pres't.
"To F. H. PIEPER, "JAMES C. WAUGH, Sec'y.
Treas., Belleville, Illinois.

(Written across the face in red ink):

"Accepted. Payable at the Continental Bank of St.
"Louis. F. H. PIEPER, Treasurer.

And on the back thereof there appears the following indorsement:

"Pay to the order of E. A. Hitchcock, Esq.
"JOHN STEVENS, JR., Cash."

And below that is the indorsement: "E. A. Hitch-
"cock."

The instrument, with the indorsements thereon, is correctly shown on pages 5 and 6 of the printed transcript of the record.

THE DECLARATION.

The declaration (*Record, pp. 2–4), contains but one count. It is as follows:

"E. A. Hitchcock, a citizen of the State of Missouri, and resident thereof, plaintiff, by his attorney, complains of William C. Buchanan and James C. Waugh, citizens of the State of Illinois, and residents thereof, defendants, of a plea of trespass on the case on promises:

*NOTE.—References so made in this abstract, are to the pages of the *printed* transcript of the record.

For that, whereas the said defendants, heretofore, to wit, on the 15th day of December. A. D., 1875, at the office of the Belleville Nail Mill Co., Belleville, Ills., to wit, at the district aforesaid, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there addressed the said bill of exchange to one F. H. Pieper, treas., Belleville, Illinois, by which said bill of exchange, they, the said defendants, then and there ordered and requested the said F. H. Pieper, four months after the date thereof, to pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy seven 13-100 dollars, value received, and to charge same to account of Belleville Nail Mill Co.; and the said F. H. Pieper then and there accepted said bill of exchange by writing on the face thereof the words "accepted; payable at the Continental Bank of St. Louis, F. H. Pieper, treasurer;" by which said written acceptance the said bill of exchange was then and there made payable at the Continental Bank of St. Louis; and said bill of exchange so made and accepted, payable as aforesaid, was afterwards then and there, to wit, on the day and year aforesaid, at the district aforesaid, delivered by said defendants to the said John Stevens, Jr,, cashier, and the said John Stevens, Jr., afterwards, to wit, on the day and year aforesaid, indorsed and delivered said bill of exchange to said plaintiff, by, which said indorsement and delivery thereof, the said bill of exchange was made payable as aforesaid to the order of said plaintiff. And said plaintiff avers that afterwards at the time when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 18th day of April, A. D., 1876, he indorsed the same, by which in-

dorsement the said sum of money in the said bill of exchange specified was at that time ordered to be paid and became payable to said plaintiff, and, being so made, accepted and indorsed as aforesaid, said bill of exchange was then presented to and shown at the Continental Bank of St. Louis, and request and demand was then and there made for the payment of the said sum of money specified in said bill of exchange, according to the tenor and effect thereof; but the said Continental Bank of St. Louis did not nor would, neither did the said F. H. Pieper, or any other person then and there, or at any time since or elsewhere, pay the said sum of money specified in said bill of exchange or any part thereof; and the said Continental Bank of St. Louis then and there at the time when said bill of exchange became due and payable and was presented for payment as aforesaid wholly refused, and the said F. H. Pieper then and there wholly negiected so to do; and afterwards, to wit, on the day and year aforesaid, the said bill of exchange was then and there protested because of the non-payment thereof. And the said plaintiff further avers that neither at the time of the making of said bill of exchange or from thence to and at the time when the same became due and payable, and was presented and shown for payment as aforesaid, had the said F. H. Pieper received into his hands any effects of the said defendants as a consideration for his aforesaid acceptance of said bill of exchange; neither had the said defendants, or either of them, at the time last mentioned, or at any other time, provided funds or made provision for the payment of said bill of exchange, and said defendants well knew and had notice before and at the time said bill of exchange became due and payable that it would

not be paid at the Continental Bank of St. Louis or else where by the said F. H. Pieper; by means whereof they, the said defendants, became liable, and in consideration thereof afterwards, to wit, on the day and year aforesaid, promised the said plaintiff to pay him the said sum of money in said bill of exchange specified, when they should be thereunto afterwards requested. And yet the said defendants have not paid said sum of money or any part thereof to said plaintiff, although often requested so to do, but to pay the same or any part thereof said defendants have hitherto refused, and still do refuse, to the damage of the said plaintiff, eight thousand dollars, and there for he brings suit," etc.

DEMURRERS TO THE DECLARATION.

Defendants (Record, pp. 5 and 6), by their respective attorneys, severally craved oyer of the instrument in the declaration mentioned, and said instrument hereinbefore set forth, being read, etc., defendants severally demurred to the declaration and prayed judgment, etc.

JUDGMENT OF THE COURT.

Afterwards, the court having heard argument of counsel (Record, p. 7), the following order was made and entered of record:

"And now on this 23d day of January, 1879, came the parties by their counsel and submit to the court the questions arising on the several demurrers of the defendants to the plaintiff's declaration, and the court having heard and considered the same, and being sufficiently advised in the premises, doth order and adjudge that said demurrers be

sustained, on the ground that the instrument declared on by the plaintiff is the bill of exchange of the Belleville Nail Mill Company and not the bill of exchange of the defendants. And it is therefore ordered by the court that the defendants recover of the plaintiff their costs in this behalf expended, and that they have execution therefor."

WRIT OF ERROR.

January 30th, 1879 (R., p. 7), on motion of plaintiff, writ of error was allowed to operate as supersedeas; bond was given, and writ of error issued February 12, 1879, upon which service of citation was indorsed and accepted, by counsel for defendants (Record, p. 1), February 20, 1879.

ERRORS ASSIGNED.

Plaintiff in error, by his attorney and counsel, now alleges and assigns the following separate and specific errors, which appear in the foregoing proceedings and rulings of the circuit court:

1. The court erred in deciding that the instrument declared on is the bill of exchange of the Belleville Nail Mill Company, and not the bill of exchange of the defendants.

2. And the said court erred in sustaining the separate demurrers to the declaration, and in rendering judgment for costs and ordering execution therefor against plaintiff and in favor of the defendants, instead of overruling said demurrers, assessing damages and rendering judgment against the defendants and in favor of plaintiff for the sum due of principal, interest and costs of suit, upon said bill of exchange made by the defendants.

THOMAS G. ALLEN,

Attorney and Counsel for Plaintiff in Error.

BRIEF, AND ARGUMENT, OF COUNSEL FOR PLAINTIFF IN ERROR.

The only questions involved in this case are those which are distinctly presented by the assignment of errors. It will be seen, by what appears in the record, that all the parties to the suit are agreed that final judgment shall be rendered upon the declaration in accordance with whatever shall be held to be the proper legal construction and effect of the instrument, a true copy of which is set forth in the separate demurrers interposed by the defendants. The fact that defendants in error had made no provision for the payment, and well knew and had notice before and at the time the bill became due and payable, that it would not be paid at the Bank or elsewhere by Pieper, the drawee and acceptor of the bill, is admitted by the seperate demurrers to the declaration. Therefore notice of protest was not required to fix their liability, if it be held, as is insisted it should be, that they, the defendants in error, were in fact the drawers of the bill. *Brower* vs. *Rupert et al.*, 24 Ills., 183; *Howes* vs. *Austin*, 35 Ills., 396; *Wood* vs. *Price*, 46 Ills., 437; *Darby* vs. *Barksdale*, 28 Mo., 165; Chitty on Bills, * p. p. 469, 590.

On behalf of plaintiff in error, it is admitted, that the legal effect of the instrument is to be determined by the court upon a view of the instrument itself, regardless of any conclusion of the pleader found in the declaration; *Brinz* vs. *Tyler*, 79 Ills. 248.

And that the instrument sued on, being shown to be a mercantile contract, negotiable in form, made and indorsed in the state of Illinois, its interpretation and validity and the remedy thereon, is to be determined by the law in

force in that state; *Scudder* vs. *Union National Bank*, 91 U. S. Reports, 406; *Chumasers* vs. *Gilbert*, 24 Ills. 293; 2 Greenleaf on Ev. 153; Hurd's Ills. St. ed., 1877, page 680, § 4.

It will be seen, the statute law in force in Illinois, at the time this suit was instituted provided, as it yet does, that no person shall be permitted to deny, on trial, the execution of any instrument in writing upon which any action may have been brought, when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit; Hurd's Illinois statutes, edition of 1877, page 738, title "Practice," § 34.

And that § 36 of the same statute, (title Practice) provided, and it yet does, that in actions upon contracts, expressed or implied, against two or more defendants, as partners or joint obligors or payees, whether so alleged or not, that proof of the joint liability or partnership of the defendants, "shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability or the execution of the instrument sued upon verified by affidavit."

POINTS AND AUTHORITIES.

Plaintiff in error submits:

1. That, inasmuch as the declaration asserts it to be a fact, that the defendants in error did make their certain bill of exchange, etc., which fact is not denied by a verified plea, and is not contradicted by what appears upon the face of the instrument shown by the demurrers to be the bill of exchange declared on in the declaration, the circuit

court should have rendered judgment thereon in favor of the plaintiff. *Norwak* vs. *Excelsior Stone Co.* 78 Ills. 308.

2. That with or without an issue of fact, the instrument declared on is properly to be taken and adjudged the bill of exchange of the defendants, upon which they are individually liable.

This view, I submit, is fully sustained by the following authorities:

In Chitty on Bills, p. 37 it is said, "If an agent sign only his own name, whether as drawer, indorser, or acceptor he will (unless in the case of a government agent contracting on its behalf) be considered as the principal, and be personally liable as such, *unless he add some restrictive or qualifying words*, as '*Sans recours*,' or '*without recourse to me*,' or 'drawn or indorsed to transfer the interest only, and not to incur any personal liability'; for it is an universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by *procuration* of another, which are words of exclusion: unless he says plainly, I am the *mere scribe*, he becomes liable." And the same author says (* p. 39) "If the known agent of A. at the request of the plaintiff, draw a bill upon B. payable to the plaintiff, although he direct B. to place the amount to the credit of A. such agent will be personally liable to the plaintiff,"—citing. *Leadbitter* vs. *Farrow* 5 M. and S. 345; *Thomas* vs. *Bishop*, 2 Stra. 955. And other cases, in the notes to Chitty, are to the same effect.

The law as thus held was fully recognized and affirmed by the Supreme Court of Illinois in the case of *Powers* vs. *Briggs et al.* 79 Ills, 493. In that case the suit was upon

promissory notes, drawn in this form: "One year after date, we the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers, six hundred dollars, value received, with interest at six per cent. per annum."

The notes were signed by four persons, designated as "Trustees," which word follows after the signature of the last name signed to the notes. In the court below, in that case, evidence was admitted, over the plaintiff's objection, showing that at the time the notes were executed, the defendants were trustees of the Seventh Presbyterian Church of Chicago, and that the notes were given for the difference in value between church organs which they had exchanged. The lower court gave judgment for the defendants. The supreme court said, the single question was, whether the notes bound the defendants individually or only the corporation of which they were trustees

"The authorities (said the court) are not entirely harmonious on the question, but, after a careful examination of the numerous cases cited in the elaborate briefs filed by the respective counsel, our opinion is, the court erred in finding that the defendants were not individually liable on the notes."

After citing the authorities, showing the proper rule of interpretation, the court further said: "Testing these notes by this rule, it would seem clear they are binding only on the defendants as individuals. Although the words, 'the Trustees of the Seventh Presbyterian Church,' appear in the body of the notes, and the word 'trustees' is appended to the defendants signatures, there are no words used implying an undertaking on the part of the corporation. The corporation is not assumed to be acting

by or through the defendants, nor does it even appear the defendants act for or on behalf of the corporation. The language clearly indicates that the defendants were trustees when they signed the notes, but not that the corporation promised to pay them."

In refering to the facts proved, outside of what appeared on the face of the notes, the court said they did not consider those facts changed the result. "True, (said the court,) they show plaintiff knew the defendants were trustees, and that the consideration of the notes was the church organ, but it does not follow from this, that the plaintiff was giving credit to the corporation, or that he knew the defendants intended, by the notes, that he should do so, and there is no evidence tending to show that he gave credit to the corporation. It was not unreasonable that the defendants, having the charge and control of the finances of the corporation, and being acquainted with its resources, would give their paper for property for the corporation, intending to protect themselves against loss from its funds, and the notes themselves are the most satisfactory evidence that they did so."

In that view of the case, the court held it to be "unnecessary to express any opinion as to the admissibility of the parole evidence."

The following are the cases cited as authority, and referred to by the court, in the foregoing opinion, delivered in *Powers* vs. *Briggs*: *Leadbetter* vs. *Farrow*, 5 M. & S., 345; *Bradlee* vs. *Boston Glass Co.*, 16 Pickering, 350; *Morrell* vs. *Codding*, 4 Allen, 403; *Leach* vs. *Blow*, 8, Smedes & Marshall, 228; *Chick* vs. *Trevett*, 20 Main, 462; *Fogg* vs. *Virgin*, 19 *id.*, 252; *Sturdevant* vs. *Hull*, 59 *id.*, 172; *Barker* vs. *M. F. Ins. Co*, 3

Wendell, 94; *Hills* vs. *Bannister*, 8 Cowen, 31; *Moss* vs. *Livingston*, 4 Comstock, 208; *Dewitt et al* vs. *Walton*, 5 Selden, 571; *Savage* vs. *Rix et al*, 9 New Hampshire, 263; *Tucker Manufacturing Co.* vs. *Fairbanks et al.* 98 Mass., 103.

To the same effect are the following: *Price* vs. *Taylor*, 5 H. & N., 540; *Dutton* vs. *Marsh*, Q. B., 19 W. R., 754; *Taft* vs. *Brewster*, 9 Johns., 334; *Stone* vs. *Wood*, 7 Cow., 453; *White* vs. *Skinner*, 13 Johnson, 307; *Appleton* vs. *Buiks*, 5 East. 148; *Fast* vs. *Ross*, 2 Hill (s. c.), 294; *Seaver* vs. *Coburn*, 10 Cush., 324; *Thatcher* vs. *Dismore*, 5 Mass., 299; *Mayhew* vs. *Prince*, 11 Mass., 54; *Duvall* vs. *Craig*, 2 Wheaton, 56.

By examination of cases, relied upon by defendants in error, as in seeming conflict with those above cited, it will be seen that, in most instances, there is a material difference between the admitted facts in those cases and the facts shown in this case.

In the case of *Means* vs. *Swormstedt*, 32 Ind., 87, the action was on a promissory note drawn in this form:

"Ninety days after date, we promise to pay to the order of Means, Kyle & Co. four hundred and eighty-three dollars, without any relief from valuation or appraisement laws. Value received. Payable at the Nat'l Branch Bank, Madison, Ind."

Signed, "Wm. B. Swormstedt, Sec'y."

The note was dated "Madison, Ind., March 18, 1868," and on its face was the impression of a *seal* bearing the words "Neal Manufacturing Co., Madison, Ind." In that case it was held that the seal of the company being in the hands of the secretary, whose duty it was to affix

it to papers executed by the corporation, the presumption was that "he did, after signing his name and adding his office, affix the seal of the corporation, which containing upon its face the proper designation of the corporation, was a signing of their name."

In *Carpenter* vs. *Farnsworth*, 106 Mass., 561, it is shown "the case was *submitted on facts agreed*, as follows: 'The Etna Mills owed Chamberlain $19.20, for an order accepted by them, payable to him or order, and Chamberlain indorsed the order to the plaintiff, who requested the defendant to pay it, whereupon the defendant, who was the treasurer of the Etna Mills, and authorized to sign checks for them, gave the plaintiff the check declared on. The Boston National Bank refused payment of the check, and due notice thereof was given to the defendant." In deciding the case, the court said: "The writing sued on being payable in the alternative to either of the persons named, or order, would seem not to be a negotiable instrument. But it is immaterial whether it is or not. If it is, the question who is liable thereon as drawer must in all cases be determined from the instrument itself. *Tucker Manufacturing Co* vs. *Fairbanks*, 98 Mass, 101–104, and authorities there cited. If it is not, there is nothing *in the circumstances under which it was made* to show an intention to charge the defendant personally, for it is *admitted* to have been given in payment for a debt of the Etna Mills." In view of the admitted facts, there can be no doubt the court properly held, in that suit against Farnsworth, that the defendant was not liable. The decision does not conflict with the

In most of the cases relied on by the defendants in error, it will be seen there were pleadings and admitted facts, different from the facts appearing in the pleadings in this case. In several, the question involved was as to the admissibility of parole evidence to sustain an action *instituted by and in the name of the prineipal* to enforce a written contract made by an admitted agent on behalf of his principal, the principal not being named in the contract; and other cases, are those where the question was as to the admissibility of parole evidence to *charge the principal* when sued on such a contract. In that class of cases it is conceded parole evidence is admissible, for the reason given by this court in *Baldwin* vs. *Bank of Newbury*, 1 Wallace, 241. In *such* cases, this court said: "Parole proof may be admitted to show the real nature of the transaction, and the admission of such proof does not contradict the instrument, but only explains the transaction,"—Citing *Higgins* vs. *Senior*, 8 Mee. & Wels., 844, wherein it was said: "Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another by reason that the act of the agent is the act of the principal."

That does not, in the least, affect the rule of law as declared by this court, in *Nash* vs. *Towne*, 5 Wallace, 703, (which is unquestionably the law in Illinois), that "parole evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."

Repeated decisions have been made, in Illinois, to the same effect. *Penny* vs. *Graves*, 12 Ills., 288; *Abrams* vs. *Pomroy*, 13 Ills., 133; *Harlow* vs. *Boswell*, 15 Ills., 57; *Wood* vs. *Price*, 46 Ills., 439; *First Nat. Bank* vs. *Whitman et al.*, 66 Ills., 338; *Canterbury* vs. *Miller*, 76 Ills., 357.

In the case of *Nash* vs. *Towne*, 5 Wallace, it was further said: "Cases may be found where it is held that the plaintiff may prove by parole that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election. Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal."

In this case, no attempt has been made to introduce extrinsic evidence to explain what is shown upon the face of the instrument in question. And I submit that, in view of the authorities, there is nothing appearing upon the face of the instrument, unaided by proper averments and proofs, that can be properly held as showing a liability on the part of the Belleville Nail Mill Company. There is no evidence whatever that the company was or is a corporation, legally empowered and authorized to make a bill of exchange. No evidence that the company ever authorized the defendants in error to make such an instrument, or any other negotiable paper, for and on behalf of the company. Nor is there anything appearing upon the face of the instrument, or elsewhere in the record, that proves the de-

fendants in error were ever, in fact, the president and secretary of the Belleville Nail Mill ompany. Nothing that shows Pieper was treasurer of the company at the time he accepted the bill in question. Whether Stevens, the payee, was the cashier of that company or of some bank or other company does not appear. Nor is there any evidence impeaching the good faith of plaintiff in error, the indorsee, in receiving the bill from Stevens, to whose order it was made payable at the Continental Bank of St. Louis by the action of the defendants in error in having it so accepted by Pieper before they, defendants in error, delivered the bill of exchange to Stevens, as is shown by the averments in the declaration.

The name of the Belleville Nail Mill Company is not set out in the body of the bill as the maker; nor does its name appear as acceptor, or payee, of the bill. It appears upon the face of the bill that it was dated, and signed by the defendants in error, at the *office* of the Belleville Nail Mill Company, and it also appears that Pieper, the drawee and acceptor, was directed by the defendants in error, to charge the amount of the bill when paid to the account of that company. That such dating of the bill, and such direction to the drawee and acceptor was a mere matter of conveinence to the drawers of the bill, who may have been, at the time, in the office of the company, and who may have had some business connection or understanding with it that called for such specific direction as was given to the drawee and acceptor, is all that can be fairly inferred from what appears upon the face of the bill. The name of the company where it does appear, constitutes no necessary part of the bill. Strike out the words "Office Belleville Nail Mill Co." and all the words

following after the words "value received," (excepting the names of the defendants in error and the name of the drawee,) and the instrument would still remain a complete and valid bill of exchange, strictly within the definition as given by Chitty, who says; "It is *defined* to be an open *letter* of request from, and *order* by, one person on another, to pay a sum of money therein mentioned to a third person." And the same author further says, "It operates as an *assignment* to a third person of a debt due to the person drawing from the person upon whom it is drawn." Chitty on Bills 9th Am. ed. * p. 1.

I respectfully submit that, whether the instrument in question be read with or without the unnecessary words which appear upon the face of it, the legal effect of it was to assign to Stevens, the payee, the debt due defendants in error from Pieper, the person upon whom the bill was drawn; and, therefore, being a negotiable commercial contract, the indorsement and delivery of the bill by Stevens to the plaintiff in error, brings this case within the rule which forbids the admission of extrinsic evidence to contradict or vary the contract as expressed by what appears upon the face, and by the indorsement on the bill. That rule is now well settled by the recent decision of this court in the case of *Martin* vs. *Cole*, decided at the present term.

THOMAS G. ALLEN,

Attorney and Counsel for Plaintiff in Error.

MAR 10 1882
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

No. 250.

E. A. HITCHCOCK,
Plaintiff in Error,

—*vs.*—

WILLIAM C. BUCHANAN AND JAMES C. WAUGH,
Defendants in Error.

Error to the Circuit Court for the Southern District of Illinois.

Brief submitted by
CHARLES W. THOMAS,
Attorney for Buchanan.

ADVOCATE STEAM PRINT, BELLEVILLE, ILLS.

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May it please the Court:

I. A demurrer does not admit every allegation of the pleading demurred to, it only admits such as are well pleaded. It was not good pleading to allege that defendants made their bill of exchange and then describe a bill made by another party. The allegation that defendants made the bill is not, in such a case, well pleaded.

II. The bill declared on is the paper of the Belleville Nail Mill Company and not the paper of the defendants, and no pleas were necessary to show this to the Court. The instrument is dated at the office of the Belleville Nail Mill Company, and directs F. H. Pieper, "*Treas.*" to pay a certain amount and "*charge same to account of Belleville Nail Mill Co.,*" and is signed "*Wm. C. Buchanan, Pres., James C. Waugh, Sec'y.*" The paper in these respects is like that in *Safford vs. Wyckoff*, 1 Hill, 11, and unlike that in any of the cases cited by counsel for plaintiff in error. Daniel in his work upon Negotiable Instruments, Sec. 411, citing the case in 1 Hill, says that the bill was plainly the bill of the corporation. See also *Witte vs. Derby Fishing Co*, 2 Conn., 435. *Fuller vs. Hooper*, 3 Gray, 334.

Judge Story thus states the rule:

> "A liberal construction is ordinarily adopted in the exception of commercial instruments for the purpose of encouraging trade and to meet, as far as possible, ordinary exigencies of business which require promptitude of execution and rarely admit of the deliberate consideration of the true force of words in furtherance of this policy if it can upon the whole instrument be collected that the true object and intent of it is to bind

the principal and not to bind the agent. Courts of justice will adopt that construction of it, however informal it may be expressed." Story Prom. Notes, Sec. 69.

In the case of *Hypes vs. Griffen*, 89 Ill., 134, the Supreme Court of Illinois draws a distinction between such cases as are cited by counsel for plaintiff in error and one where the only indication of agency is some word following the name of the maker who acts as the agent of a corporation in making the paper, and says:

> "It seems to be settled so far as there is any well defined rule on this subject, that where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills or in accepting drafts or other evidences of indebtedness in its ordinary business, if it appear it was the obligation of the corporation, and the cashier or agent had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence."

Under this decision the mere addition to his signature by the officer of a corporation of some word indicative of agency, is sufficient to let in parol evidence of the real facts connected with the execution of the paper, or in other words is enough to raise a doubt as to whether the paper is the paper of the officer or the corporation. In the case at bar, if there were no other circumstances indicating that the paper sued on was the paper of the Belleville Nail Mill Company except the words "*Prest.*" and "*Sec'y.*" following the signatures, it would be necessary under the decision last cited to plead the agency of the officers, but, as shown above, the paper on its face is clearly the paper of the corporation, and no extrinsic facts need be shown to prove this.

When this paper is read in the light of modern business transactions and ordinary common sense it is scarcely conceivable that any one should seriously contend that it could be mistaken by any business man for the individual bill of the defendants in error, and there must have been some such a circumstance as the insolvency of the real maker to induce the plaintiff in error himself to believe that the Belleville Nail Mill Company did not draw this bill.

CHARLES W. THOMAS,
Attorney for Buchanan.